Supreme Court, U. S.
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In The

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1323

HUBBARD BROADCASTING, INC., JERRY DANZIGER, RICHARD McKEE, LEO ZANI, DIANE DIMOND, JOHN DOE and JANE DOE, *Petitioners*,

vs.

M. A. AMMERMAN, JERRY LANDAVAZO, JAMES D. WEBB and JIM GOLDEN, *Respondents*.

PETITION FOR A WRIT OF CERTIORARI TO THE NEW MEXICO COURT OF APPEALS

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PETITION FOR A WRIT OF CERTIORARI TO THE NEW MEXICO COURT OF APPEALS

The Petitioners respectfully pray that a Writ of Certiorari issue to review the judgment and opinion of the New Mexico Court of Appeals entered on November 15, 1977.

OPINIONS BELOW

The opinion of the District Court of Bernalillo County, New Mexico, entered on November 5, 1976 (appendix A, *infra*), is not reported, nor is the opinion of the Court of Appeals of the State of New Mexico reversing the same (appendix B, *infra*), nor is the opinion of the Supreme Court of the State of New Mexico denying the Petition for Writ of Certiorari (appendix C).

JURISDICTION

Petitioners' Motion for Summary Judgment on the grounds that there was no evidence of "actual malice" as required by the U. S. Constitution in libel actions brought by public officials against newsmen was granted by the Bernalillo County District Court on November 5, 1976 (appendix A, *infra*). On November 15, 1977, the Court of Appeals of the State of New Mexico reversed that decision and ordered disclosure of the newsmen's confidential informants (appendix B, *infra*). A timely Petition for Writ of Certiorari was denied by the Supreme Court of the State of New Mexico on December 27, 1977 (appendix C, *infra*). Jurisdiction of this Court is invoked under U. S. Supreme Court Rule 19(1)(a) 28 U.S.C.A.

QUESTIONS PRESENTED FOR REVIEW

1. Whether the New Mexico Court of Appeals, in reversing the trial court's summary judgment for Defendants, correctly applied the "actual malice" test as required by the United States Constitution in libel actions brought by public officials against newsmen.

2. Whether the New Mexico Court of Appeals erred in ordering the newsmen to disclose their confidential informants so the trial court could determine if they were reliable or the reports accurate, when that disclosure would not be calculated to discover evidence that would tend to establish malice or reckless conduct by the Defendants.

CONSTITUTIONAL PROVISIONS INVOLVED

First Amendment, Constitution of the United States, Right of Freedom of the Press.

STATEMENT OF THE CASE

Proceedings

Six different lawsuits were brought against the Defendants in the District Court of Bernalillo County, New Mexico, by Sheriff Joe Wilson and four Deputy Sheriffs in the Bernalillo County Sheriff's office to recover damages for alleged defamation. The suits alleged that broadcasts beginning June 13, 1975, were false and were made with "actual malice" and were calculated to destroy the reputation of the Plaintiffs. The compensatory and punitive damages sought totalled $22.5 million.

The suit brought by Sheriff Wilson was dismissed by the entry of a Summary Judgment on March 6, 1976, and is not subject to this Appeal.

The suits by Deputy Sheriffs M. A. Ammerman, James D. Webb, Jim Golden, and Jerry Landavazo were consolidated before the Honorable Richard B. Traub, District Judge.

Defendants filed a motion for summary judgment on the grounds that there was no evidence of "actual malice" as required by the U. S. Constitution in libel actions by public officials against newsmen. At the same time that motion was heard, the Deputy Sheriffs argued their motion to require the newsmen to reveal the identity of their confidential informants. On May 4, 1976, the trial court determined that although there was no evidence of actual malice, nevertheless the Plaintiffs were not public officials and actual malice was not required. The trial court denied the motion for summary judgment and entered an order requiring the Defendants to disclose the identity of their confidential informants. Defendants ap-

pealed to the New Mexico Supreme Court under a New Mexico statute which granted newsmen a limited privilege. The New Mexico Supreme Court held that the statute was unconstitutional, but refused to consider whether there existed a Constitutional privilege for newsmen to withhold the identity of confidential informants in civil libel suits. *Ammerman, et al* v. *Hubbard Broadcasting, Inc.*, 89 N.M. 307, 551 P.2d 1354 (1976) (appendix D).

The trial court again entered several orders regarding disclosure, and Defendants petitioned the New Mexico Supreme Court for a Writ of Prohibition in New Mexico Supreme Court Cause No. 11043, Hubbard Broadcasting Company v. Hon. Richard B. Traub. The permanent writ was denied, and the New Mexico Supreme Court remanded to the district court (appendix E).

The trial court again scheduled for hearing all pending motions. At that time the district court reconsidered its prior decision on Defendants' motion for summary judgment and its prior order of disclosure. It determined that there was no evidence of actual malice, and that disclosure of the confidential informants would not be calculated to lead to evidence of malice or reckless disregard, and it therefore entered summary judgment for Defendants (appendix A).

The Plaintiffs appealed to the New Mexico Court of Appeals, which reversed the summary judgment, and ordered the disclosure of the confidential informants so the court could "determine whether the informants are reliable persons and the reports given are accurate." (appendix B). Defendants' Petition for Writ of Certiorari to the New Mexico Supreme Court was denied on December 27, 1977 (appendix C).

Statement of Facts Material to Consideration of the Questions Presented

Prior to June 13, 1975, and through the period including November 25, 1975, a controversy of great public and general concern was being investigated by the Attorney General's office of the State of New Mexico concerning alleged irregularities in the operation of the Bernalillo County Sheriff's Office, including, among other things, allegations of unauthorized use of county cars; improper use of credit cards and the Sheriff's Department plane; employment of Sheriff's deputies with criminal records; unauthorized removal by Sheriff's deputies of a prisoner from the county jail; deputies attempting to illegally transport Mexican aliens into the United States; failure of Sheriff Wilson to properly discharge the duties of his office (appendix A). During this period all of the Plaintiffs were deputy sheriffs and full time salaried employees within the Bernalillo County Sheriff's Department (appendix A). The alleged defamatory statements were made by the Defendants or their agents during the period referred to, and were made in radio broadcasts reporting the various activities of the Sheriff's Department, in part quoting from confidential informants who were identified only as employees of the Sheriff's Department (appendix A).

With respect to *Lieutenant Mort Ammerman*, the allegations were to the effect that he had made two trips to El Paso in an attempt to bring an illegal alien back to New Mexico to serve as housekeeper for Sheriff Wilson. Another allegation concerning Lt. Ammerman was regarding the use of the Sheriff's Department plane to drop Sheriff Wilson off in Los Angeles so that he could go on to a bridge tournament or chess tournament in Hawaii, and to pick up a prisoner with whom to return to New

Mexico. The information in the broadcast was a direct quote from an informant within the Sheriff's Department.

In his deposition, Lt. Ammerman admitted that he flew the department airplane to Los Angeles taking Sheriff Wilson and his nephew with him, and that Sheriff Wilson continued on to Hawaii from Los Angeles in order to play in a bridge tournament. Ammerman stated that he then went on to San Diego to pick up a prisoner and then returned to Albuquerque.

Ammerman also admitted in his deposition that he had in fact made several flights to El Paso, and spoke openly of the trips and that he was on a "special detail" for the Sheriff. He admitted that credit cards were transferred to him and used by him on these trips. He further admitted that he was stopped by immigration officers and his vehicle was searched for an illegal alien, and that this search for an illegal alien was discussed openly many times in the Sheriff's Department. Defendants had been informed by the Border Patrol that Lt. Ammerman was in fact stopped on the suspicion that he was transporting an illegal alien back into the United States.

In opposition to the Defendants' Motion for Summary Judgment, the deputy sheriffs filed an affidavit by Joseph P. Collins stating that he told the newsmen "that if they had information that Ammerman had transported a wetback maid from Juarez that it was absolutely false." This was the same Lt. Collins who was held in contempt of court with one of the Plaintiffs herein, as is subsequently explained. In spite of Ammerman's admissions in his deposition cited above showing the broadcast material to be correct, the Court of Appeals concluded that the affidavit was evidence that the newsmen knew the information broadcast was false, yet they aired this information (appendix B). At no time, however, did the newsmen state

that Lt. Ammerman actually transported an illegal alien from Juarez. Rather, the broadcast quoted informants who stated that Ammerman went to Juarez with the intention of transporting an illegal alien to Albuquerque and that he was stopped and searched by the Border Patrol. Ammerman admitted the search of his vehicle by immigration officials for an illegal alien and that the incident was discussed openly in the Sheriff's Department.

It is the Defendants' contention that the Court of Appeals misapplied the "actual malice" test, since the affidavit of Mr. Collins does not conflict with the broadcast by the Defendants and does not constitute "clear and convincing evidence" of actual malice.

With respect to *Deputy Sheriff Landavazo*, the New Mexico Court of Appeals held that there was evidence of reckless disregard of the truth (malice) by the newsmen in failing to call the Arizona State Penitentiary to verify imprisonment of Landavazo (appendix B). The broadcast had quoted a confidential informant to the effect that several members of the Sheriff's Department had criminal records. The informant stated that he had heard that Deputy Landavazo had spent time in the Arizona State Penitentiary. The reporters testified that they attempted to confirm this information, but that both the Sheriff's Department and the FBI refused to verify the information on the grounds of confidentiality. However, the New Mexico Attorney General's office confirmed that there were known felons working in the Sheriff's Department. The reporters were shown rap sheets by an informant, including one on Landavazo. Landavazo was called in the early hours of the morning before the broadcast, but refused to confirm or deny the information. Based on their investigation, the reporters testified that they believed the information about Landavazo to be true.

As depositions later disclosed, there were indeed eight members of the Sheriff's Department with felony convictions, and Landavazo had been charged but the charge had apparently been dismissed.

However, the Court of Appeals of the State of New Mexico found that there was evidence of "malice" because the reporters failed to contact the Arizona State Penitentiary to verify the imprisonment of Landavazo. According to the New Mexico Court of Appeals, this was evidence of a reckless disregard of the truth (appendix B). The reporter testified that he did not attempt to contact the prison authorities, because, in his experience, such attempt would be futile. He further stated that he was not concerned with the prison time, but rather with felony convictions. This also was interpreted by the Court of Appeals to be evidence of reckless disregard of the truth, or "malice" (appendix B). Defendants contend that the Court of Appeals erred in its application of the "actual malice" test.

With respect to *Deputy Sheriffs Golden and Webb*, the Court of Appeals appeared to agree with the district court that there was no evidence of actual malice, but held that the Summary Judgment was premature. It ordered the newsmen to disclose their confidential informants so the trial court could determine whether the informants were reliable persons and the reports given were accurate (appendix B).

The broadcast regarding Lt. Golden and Sgt. Webb was to the effect that they were at a racetrack in Santa Fe, New Mexico, and not on official business, and were therefore using county vehicles improperly. Lieutenant Golden admitted in his deposition that he and Sgt. Webb had been at Santa Fe Downs attending the races and that they had traveled to the races in county vehicles. After

the races, he and Webb ate and drank at the Turf Club with another individual and some ladies. He admitted that an independent observer would have no way of knowing whether they were there on personal or official business.

In his deposition, Lt. Golden claimed that he had a letter from Sheriff Joe Wilson authorizing him to use county vehicles to go from Albuquerque to the Santa Fe racetrack and that such trip was on official business. Defendants, however, produced evidence that although Lt. Golden testified to the same thing in the trial of Sheriff Joe Wilson wherein the Sheriff was being charged with misconduct in office, and after that trial both Wilson and Golden pled guilty to charges of giving false testimony with regard to the letter. It appeared that Sheriff Wilson's letter had been post-dated after the broadcast.

Sgt. Webb and Lt. Golden were also reportedly involved in the Clara Lucero incidents referred to in the broadcasts. In brief, the newsmen reported that Clara Lucero had been checked out of jail without prior consent of the court and in violation of the court orders. Defendants presented evidence to the district court that Lt. Golden had admitted at his deposition that he and Sergeant Webb had checked Clara Lucero out of jail at 11:15 at night, and that there was no record of where she spent the night. Evidence further showed that Judge Rozier Sanchez had released Clara Lucero to their custody, but that they did not keep her in their custody all night. Instead, they allowed her to spend the night with her mother, without guard, though Clara Lucero had been sentenced to prison at Santa Fe and had been brought back to Albuquerque only for the stated purpose of seeing her attorney. She in fact had not seen her attorney. Evidence was further presented to the court, through Lt. Golden's

own testimony, that he was present when Officers Collins and Webb were tried for contempt of court for violating the court's order regarding Clara Lucero. They were found in contempt of court, and Golden admitted that if they were in contempt, he may also have been.

Though the information broadcast regarding Golden and Webb was proven to be substantially true, and no evidence of "actual malice" was presented in opposition to the Motion for Summary Judgment, the Court of Appeals held that the summary judgment was premature and ordered the disclosure of the newsmen's confidential informants so their reliability and the accuracy of their reports could be reviewed (appendix B). The district court had already determined that the disclosure would not tend to lead to discovery of evidence of actual malice (appendix A). It is Defendants' position that the denial of the summary judgment and the direction to disclose the confidential informants was a violation of the newsmen's constitutional rights.

REASONS FOR GRANTING THE WRIT

The significant questions of law presented in this case involve the extent of the protections of Freedom of the Press afforded by the Constitution of the United States in libel cases. The Court of Appeals has incorrectly applied the rule of "actual malice" required by the U. S. Supreme Court in libel actions brought by public officials against newsmen. The Court of Appeals determined, in effect, that failure to investigate fully, negligent failure to investigate, evidence that the confidential informants were unreliable or inaccurate, and self-serving affidavits which do not directly conflict with the broadcasts, constitute material evidence of actual malice. This is directly contrary to the prior opinions of the U. S. Supreme Court.

In the landmark case of *New York Times* v. *Sullivan*, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964), the United States Supreme Court held that the Constitution requires a public official suing for defamation to prove "that the statement was made with 'actual malice' ". Justice Brennan, writing for the Court, 376 U.S. at 279-280, 84 S.Ct. at 726, stated the rule as follows:

> "The Constitutional guarantees require, we think, a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not."

The proof of malice must be of "convincing clarity". *New York Times* v. *Sullivan, supra*, 376 U.S. at 285-286, 84 S.Ct. at 729. The proof must show a "high degree of awareness . . . of probable falsity. . ." *Garrison* v. *Louisiana*, 379 U.S. 64, 74, 85 S.Ct. 209, 216 (1964).

Mere negligence in failing to discover the alleged falsity of the statement has been held insufficient to show actual malice. *New York Times* v. *Sullivan, supra; Rosenblatt* v. *Baer*, 383 U.S. 75, 86 S.Ct. 669, 15 L.Ed.2d 597 (1966); *St. Amant* v. *Thompson*, 390 U.S. 727, 88 S.Ct. 1323 (1968). Similarly, a failure to make a prior investigation does not constitute proof sufficient to present a question of whether the statements were published with reckless disregard or not. *Beckley Newspapers Corp.* v. *Hanks*, 389 U.S. 81, 84-85; 88 S.Ct. 197, 200 (1967).

Nor can the reasonable man test be used to establish whether there is reckless disregard of the truth or falsity

of the statement. In *St. Amant* v. *Thompson, supra,* 390 U.S. at 731, 88 S.Ct. at 1325, the Supreme Court stated:

> "These cases are clear that reckless conduct is not measured by whether a reasonably prudent man would have published, or would have investigated before publishing. There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication."

Public officials may recover for injury to reputation only on clear and convicing proof that the defamatory falsehood was made with knowledge of its falsity or with reckless disregard for the truth. In *Gertz* v. *Robert Welch, Inc.,* 418 U.S. 323, 94 S.Ct. 2997 (1974), at 335, the court stated:

> "Reckless disregard of the truth [means] subjective awareness of probable falsity. There must be sufficient evidence to permit the conclusion that the defendant, in fact, entertained serious doubts as to the truth of his publication."

In the instant case, the New Mexico Court of Appeals determined, in effect, that the newsmen's failure to contact the Arizona State Penitentiary to verify the imprisonment of Deputy Landavazo, and the newsmen's statement that he was not interested in prison time, but only in felony convictions, constituted evidence of reckless disregard for the truth and thereby actual malice. The Court of Appeals also concluded, in effect, that Officer Collins' non-conflicting affidavit that Lt. Ammerman had not "transported a wetback maid from Juarez" was evidence of actual knowledge by Defendants of a falsehood, when, in fact, Defendants' broadcast had only indicated an attempt to bring an illegal alien across the border. Further, the New Mexico Court of Appeals appeared to have determined, with respect to Deputy Sheriffs Golden and Webb,

that there was no evidence of actual malice, but that the newsmen should be ordered to disclose their confidential informants so the trial court could determine whether the informants were reliable persons and the reports given were accurate.

These decisions are in direct conflict to the protections afforded newsmen under the Constitution in libel actions brought by public officials, and are misapplications of the "actual malice" test established by the United States Supreme Court. The evidence cited by the Court of Appeals certainly is not proof of malice with convincing clarity.

Though Defendants have demonstrated that the matters broadcast were substantially true, Plaintiffs have attempted to use marginal factual disputes as leverage to obtain the informants' identities. The Plaintiffs have throughout this case been more interested in the identity of the confidential informants than any other aspect of this case. The fact that the broadcast revealed that some of the confidential informants were in the Sheriff's Department contributed to this interest. Numerous affidavits were filed regarding reasons why the identity of the confidential informants should not be disclosed. Yet in spite of the fact that virtually every fact reported by the confidential informants and quoted in the broadcast was either admitted to be true or was proven to be true by other evidence, the Court of Appeals ordered disclosure of the confidential informants. The New Mexico Supreme Court refused to hear the case and once again, as they have done on two previous occasions (appendices D and E), refused to grant the newsmen *any* constitutional protection.

Though the United States Supreme Court has not directly addressed this issue, it articulated support for the conditional or qualified privilege for newsmen to withhold disclosure of confidential sources when it decided

the trilogy of cases cited under *Branzburg* v. *Hayes*, 408 U.S. 665, 92 S.Ct. 2646 (1972); those cases included *Branzburg* v. *Hayes; In the Matter of Pappas;* and *United States* v. *Caldwell,* which cases dealt only with a single issue: the obligation of reporters to respond to a grand jury subpoena and to answer relevant questions concerning an investigation into the commission of a crime. The majority opinion by Justice White stated:

> "We do not question the significance of free speech, press, or assembly to the country's welfare. Nor is it suggested that news gathering does not qualify for First Amendment protection; . . ." At 92 S.Ct. 2646, 2656, 408 U.S. 665, 681.

Even though the court held in all three cases that reporters could be required to testify and to divulge their sources before criminal grand juries, these cases, as well as *State* v. *Knops*, 49 Wis.2d 647, 183 N.W.2d 93 (1971), and *In re Goodfader*, 75 Haw. 317, 367 P.2d 472 (1961), recognized the constitutional privilege for newsmen and provided the framework around which the newsmen's constitutional privilege continued to develop. Even the United States Department of Justice has adopted guidelines at 28 CFR §50.10 (1975) which incorporate "compelling need and lack of alternative means" as a standard to be followed in determining whether a request for issuance of a subpoena to the news media should be granted. This same standard was adopted in *Garland* v. *Torre*, 259 F.2d 545 (2nd Cir. 1958), in which the court stated:

> "What must be determined is whether the interest to be served by compelling the testimony of the witness in the present case justifies some impairment of this First Amendment freedom."

More recently, many lower court decisions have recognized a qualified privilege for newsmen to withhold disclosure of confidential sources, particularly in civil actions. In *Baker* v. *F & F Investment*, 470 F.2d 778 (2nd Cir. 1972) a reporter was not required to disclose his sources for writing an article on discrimination in real estate practices, the court noting, in pertinent part:

> ". . . a paramount public interest in the maintenance of a vigorous, aggressive and independent press capable of participating in robust, unfettered debate over controversial matters, an interest which has always been a principal concern of the First Amendment, . . . Compelled disclosure of confidential sources unquestionably threatens a journalist's ability to secure information that is made available to him only on a confidential basis, and the district court so found. . . .
>
> • • •
>
> [t]hough a journalist's right to protect confidential sources may not take precedence over that rare overriding and compelling interest, we are of the view that there are circumstances, at the very least in civil cases, in which the public interest in non-disclosure of a journalist's confidential sources outweighs the public and private interest in compelled testimony."

In *Cervantes* v. *Time, Inc.*, 464 F.2d 986 (8th Cir. 1972), the court refused to "routinely grant motions seeking compulsory disclosure of anonymous news sources". In footnoting the list of cases leading up to *Branzburg* v. *Hayes, supra,* the court stated:

> "In two recent cases, however, it has been held that a libel defendant's refusal to reveal the identity of its news sources need not bar the entry of summary judgment in its favor. *Konigsberg* v. *Time, Inc.*, 312

F.Supp. 848 (S.D. N.Y., 1970), and *Cerrito* v. *Time, Inc.*, 302 F.Supp. 1071 (N.D. Cal., 1969), aff'd per curiam, 449 F.2d 306 (C.A. 9 1971). Implicit in each of these cases is tacit approval of the contention that the free flow of news obtainable only from anonymous sources is likely to be deterred absent complete confidentiality. *Hence, each court seemed to reason that, absent a positive showing of relevance or materiality, a newsman need not divulge the identity of his confidential news informants.* . . The Court was not faced with and, therefore, did not address, the question whether a civil libel suit should command the quite different reconciliation of conflicting interests pressed upon us here by the defense." (Emphasis added)

"Indeed, as the Court observed in Caldwell, . . . 'without some protection for seeking out the news, freedom of the press could be eviscerated.' 406 U.S. at 681, 92 S.Ct. at 2656. Similarly, *to compel a newsman to breach a confidential relationship merely because a libel suit has been filed against him would seem inevitably to lead to an excessive restraint on the scope of legitimate newsgathering activity.*" (Emphasis added)

Similar statements have been made in *Democratic National Committee* v. *McCord*, 356 F.Supp. 1394 (D.D.C. 1973) and in *Loadholtz* v. *Fields*, 389 F.Supp. 1299 (D.C. Fl. 1975). In the *Loadholtz*, case, *supra*, the court concluded that the paramount interest served by the unrestricted flow of public information protected by the First Amendment outweighed the subordinate interest served by the liberal discovery provisions invited in the Federal Rules of Civil Procedure. The court stated:

"Analysis in this area must necessarily begin with the axiomatic principle that the First Amendment occupies a preferred position among the individual rights conferred by the Constitution and that any infringements thereon are closely scrutinized and strictly limited (citations omitted). The concept of freedom of the press as guaranteed by the First Amendment is the keystone of our constitutional democracy and is broad enough to include virtually all activities for the press to fulfill its First Amendment functions (citations omitted). Only a 'compelling state interest in the regulation of a subject within the State's constitutional power to regulate can justify limiting First Amendment freedoms' (citations omitted). Any justifiable infringement upon First Amendment rights must be no greater than is necessary to vindicate legitimate subordinating interests (citations omitted)."

It then concluded that the plaintiff had advanced no compelling interest to justify disclosure of any information that formed the basis of the newspaper article, and discovery was limited in that civil action.

Like the foregoing cases, there is no compelling need in this libel action for disclosure of the newsmen's confidential sources. As noted in the *Baker* v. *F & F Investment* case, *supra*, such compelled disclosure threatens a journalist's ability to secure information and undoubtedly will have a decided effect on future "undercover" investigative reporting, and thereby threatens freedom of the press and the public's need to be informed. Disclosure also constitutes a danger to the informants which is totally unnecessary.

To require that this case be tried on what appears to be totally inadequate evidence regarding malice or reckless disregard, and certainly less than "clear and convincing evidence" of the same, is in itself a violation of the standards set by the United States Supreme

Court for libel actions brought by public officials. This Court has stated that the "Constitutional guarantees require" actual malice with convincing clarity. The New Mexico Appellate Courts have refused to protect the newsmen with that constitutional guarantee, by requiring that a case be tried on evidence which is constitutionally insufficient. Further, in derogation of Freedom of the Press the Appellate Court, while admitting there is no question of material fact as to malice, has ordered that the defendants disclose the identity of their confidential informants to "determine whether they are reliable persons and the reports given are accurate," constituting a further invasion of the Constitutional right of Freedom of the Press.

Because the State Appellate Court has refused to follow the standards set by the U. S. Supreme Court, the Defendants are denied the "Constitutional guarantees" unless this Court will enforce them. The issues presented in this petition are of substantial public interest and should be determined by the United States Supreme Court. We respectfully request that this Court grant Certiorari.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the New Mexico Court of Appeals.

Respectfully submitted,

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APPENDIX

APPENDIX A

STATE OF NEW MEXICO
IN THE DISTRICT COURT

No. 7-75-03366
M. A. AMMERMAN, Plaintiff,
vs.
HUBBARD BROADCASTING, INC., et al.,
Defendants.

No. 7-75-03578
JAMES D. WEBB, Plaintiff,
vs.
HUBBARD BROADCASTING, INC., et al.,
Defendants.

No. 7-75-03579
JIM GOLDEN, Plaintiff,
vs.
HUBBARD BROADCASTING, INC., et al.,
Defendants.

No. 10-75-04826
JERRY LANDAVAZO, Plaintiff,
vs.
HUBBARD BROADCASTING, INC., et al.,
Defendants.

No. 2-76-00476
CONSOLIDATED
JERRY LANDAVAZO, Plaintiff,
vs.
HUBBARD BROADCASTING, INC., et al.,
Defendants.

MEMORANDUM OPINION AND JUDGMENT OF DISMISSAL

(Filed November 5, 1976)

Some time ago this Court conducted a lengthy hearing on Defendants' motions for summary judgment. In these motions, defendants maintained that the alleged defamatory material contained in their news broadcasts were privileged on the ground that the plaintiffs, as deputy sheriffs, were public officials, and, as such, this case came within the decision in New York Times v. Sullivan, 376 US 254. The New York Times decision held that in a civil libel suit by a *public official* against a newspaper, the First Amendment required clear and convincing proof that a defamatory falsehood alleged as libel was uttered with "knowledge that it was false or with reckless disregard of whether it was false or not." This same requirement was later held to apply to *public figures.*

Based on the affidavits, depositions, and pleadings in the record, together with the testimony produced at the summary judgment hearing, this Court concluded, at that time, that the motions for summary judgment should be denied, because the Court found that the plaintiffs were not *public officials,* and the standard of proof required in the New York Times case did not apply to the present situation.

The Court did, however, allow an interlocutory appeal so that the issue as to whether or not the plaintiffs were *public officials* could be determined by an appellate Court. This Court had decided that if in fact the plaintiffs were public officials, and if the New York Times case applied, then the defendants' motions for summary judgment should be granted. The Court had concluded based on the exhibits, affidavits, depositions, pleadings, and testimony, that

there was no genuine issue as to any material fact that could show that the defendants acted with actual malice or that they acted recklessly or with knowledge that the defamatory material was false.

The Court of Appeals denied the defendants the right to file an interlocutory appeal leaving the issue of *public official* undecided.

In preparation for today's hearing on the pending motions for default judgment and on the problems arising out of the order of disclosure of confidential informants, the Court has completely reviewed all the files, pleadings, exhibits, depositions, and legal briefs, and has conducted independent research into the issues inherent herein, because of the gravity of the action which this Court may be compelled to take if the defendants refuse to abide by the Court's order of disclosure of confidential informants.

The Court in its own research discovered the case of Rosenbloom v. Metromedia, 403 U.S. 29, a 1971 United States Supreme Court decision, which seems to be dispositive of the issues in the present case. The Rosenbloom case attacked the problem of whether or not the New York Times standard of proof of malice and recklessness applied in a case where the persons defamed were not *public officials* or *public figures,* but were private individuals who were defamed in a broadcast related to an individual's involvement in an event of public or general interest. This United States Supreme Court decision holds that the Constitutional guaranties of freedom of speech and of the press require that a person, although not a public official or a public figure, seeking recovery from a radio station for alleged defamatory statements made in a newscast concerning his involvement in an event of public or general concern, must establish by *clear and convincing proof* that the falsehoods were broadcast with

knowledge of their falsity or with reckless disregard of whether they were false or not, such constitutional guaranties thus limiting a state's power to apply its libel laws allowing recovery upon proof that the falsehoods resulted from failure to exercise reasonable care.

In other words, the U.S. Supreme Court has held that the New York Times standard of proof applies to *private individuals* as well as *public officials* and *public figures* when the defamatory material concerns the individuals' involvement in a matter of public or general concern.

The legal issue decided in the Rosenbloom case was never raised by defendants' attorney in their motion for summary judgment, was never argued to this Court, nor set forth in defendants' brief before the Court of Appeals. Had this issue been raised by defense counsel at the hearing on the motions for summary judgment, the Court would have, at that time, granted the defendants' summary judgment motions. Such a decision would have avoided the necessity for successive appeals to the Supreme Court of New Mexico on the serious constitutional questions surrounding the Court's order of disclosure of confidential informants. Further, the concern of defendants Dimond and Zani as to possible incarceration for refusal to comply with the Court's disclosure order would have been avoided.

In conclusion, the Court on its own motion is reconsidering its previous decision on defendants' motions for summary judgment and FINDS AS FOLLOWS:

1. Prior to June 13, 1975, and through the period including November 21, 1975, a controversy of great public and general concern was being investigated by the Attorney General's Office of the State of New Mexico and by the defendants herein, concerning alleged irregularities in

the operation of the Bernalillo County Sheriffs Office, and specifically concerning, amongst other things, allegations of:

a. unauthorized use of County cars;

b. improper use of credit cards and the Sheriff's Department plane;

c. employment of Sheriff's deputies with criminal records;

d. unauthorized removal by Sheriff's deputies of Clara Lucero from the County Jail;

e. deputies illegally transporting Mexican aliens into the United States for use by Sheriff Wilson;

f. failure of Sheriff Wilson to properly discharge the duties of his office; and

g. the giving of perjured testimony by the Sheriff and his deputies to a Grand Jury.

2. During this period all the plaintiffs herein were salaried employees and deputy sheriffs with the Bernalillo County Sheriff's Department.

3. The alleged defamatory statements were made by the defendants or their agents during the period referred to, and were made in connection with their investigation of the matters set out in paragraph one.

4. There is no substantial evidence contained in the pleadings, the exhibits, depositions, affidavits, or testimony that the defendants or any of them acted maliciously, or with knowledge of the falsity of any of the alleged defamatory statements or with reckless disregard of whether the statements were false or not.

5. The plaintiffs are neither public officials nor public figures, but are private persons allegedly defamed in connection with an event of public or general concern, and

the standard of proof as set out in the Rosenbloom and New York Times cases applies herein.

6. There is no genuine issue as to any material fact that could show that the defendants acted with malice or that they acted recklessly or with knowledge that the defamatory material was false; and the alleged defamatory statements made by the defendants were privileged within the limitations set out in the Rosenbloom and New York Times cases.

7. The disclosure of the defendants' confidential informants and the taped interviews would not be calculated to discover evidence that would tend to establish malice or reckless conduct by the defendants, and therefore entry of summary judgment should not be delayed, Cervantes v. Time, Inc., 464 F 2d 986.

8. All other issues raised by pending motions are now moot.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the order filed herein denying the defendants' motions for summary judgment be vacated and set aside; and it is

FURTHER ORDERED, ADJUDGED AND DECREED that the motions for summary judgment filed herein by the defendants be, and the same are hereby, granted; and it is

FURTHER ORDERED, ADJUDGED AND DECREED that all plaintiffs' complaints herein be, and the same are hereby, dismissed with prejudice.

/s/ Richard B. Traub
Richard B. Traub, District Judge
Second Judicial District, Div. XI

APPENDIX B

IN THE COURT OF APPEALS OF THE
STATE OF NEW MEXICO

No. 2818

M. A. AMMERMAN, JERRY LANDAVAZO, JAMES D. WEBB and JIM GOLDEN,
Plaintiffs-Appellants,

v.

HUBBARD BROADCASTING, INC., JERRY DANZIGER, RICHARD McKEE, LEO ZANI, DIANE DIMOND, JOHN DOE and JANE DOE,
Defendants-Appellees.

APPEAL FROM THE DISTRICT COURT OF BERNALILLO COUNTY

TRAUB, Judge

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OPINION

(Filed November 15, 1977)

SUTIN, Judge

Plaintiffs, as deputy sheriffs in Bernalillo County, separately sued defendants for defamation based upon broadcasts by Station KOB Radio on June 13, 1975 and June 24, 1975. These cases were consolidated for trial. Summary judgment was granted defendants, and plaintiffs appeal. We reverse.

A. *Prologue*

Hubbard Broadcasting, Inc. was the owner of Radio Station KOB. Its news director was Leo Zani. Its reporter was Diane Dimond.

On June 13, 1975, defendants Zani and Dimond aired two radio broadcasts on KOB to bring to the public a special report on the controversy surrounding the Bernalillo County Sheriff's Department, specifically its leader, Sheriff Joe Wilson.

The broadcast consisted of quotations from transcribed taped interviews held with confidential informants. The following excerpts were directed to plaintiffs, Jerry Landavazo, James D. Webb, Jim Golden and M. A. Ammerman, all deputy sheriffs:

> There is another new man, his name is *Jerry Landavazo. I hear that he has served time in the penitentiary in Arizona.* [Emphasis added]

On misuse of taxpayers' funds in the form of County vehicles, the broadcast said:

> On Sunday afternoon *Jim Golden and Jim Webb* were at a race track in Santa Fe. . . . The car was a

> '75 white Plymouth. It was a County vehicle assigned to these boys to do investigation work with only. *They were not on any assigned case.* . . .
>
> * * *
>
> Now the matter of misuse of credit cards appeared. We asked our sources for specific instances. *They cited a trip to El Paso made by a Lieutenant to transport an illegal alien back to New Mexico to serve as Sheriff Wilson's personal housekeeper. . . . Lieutenant Mort Ammerman* rumored for a week that he was going on a special detail for the Sheriff to El Paso. . . . I personally saw the credit card transfer from Officer Don Marquez to Lieutenant Ammerman. Marquez had the card in his possession that morning and he gave it to Ammerman. . . .
>
> * * *
>
> *We had also heard of another trip taken by this Sheriff to the El Paso area. It, presumably, was to be a second try at obtaining a certain illegal alien to be brought back to New Mexico to serve as a housekeeper for Sheriff Wilson. She was chosen, say our sources, because her fate was of personal interest to Lieutenant Ammerman.* [Emphasis added]

On June 24, 1975, Zani and Dimond aired a radio broadcast about a criminal case that involved Clara Mary Lucero. By an order of court, she was brought to the Bernalillo County jail on January 30, 1975 to confer with her attorney and then return to the State Penitentiary. Her furlough was extended for eight days. She did not stay in the Bernalillo County jail on February 1st, 2nd, 3rd, 4th or 5th. On January 30, 1975, at 11:15 p.m., she was checked out to a couple of Sheriff's deputies, Joe Collins and *Jim Webb,* in violation of the court's order.

She was seen at Holiday Inn with Joe Collins and possibly *Jim Webb*. The eyewitness recognized Joe Collins. The broadcast continued:

> Recently, Deputy *Landavazo* filed suit against owners, managers and reporters of KOB and a (sic) sworn complaint, *Landavazo* claims the information given to KOB was erroneous. *Based solely on his sworn complaint KOB, its owners, manager and reporters wish to retract the previous statement and issue their apology to Deputy Jerry Landavazo.* [Emphasis added]

After some discovery procedures, defendants filed a motion for summary judgment because there was no evidence of malice and the broadcasts alleged were privileged. The trial court held a lengthy hearing and denied the motion because plaintiffs were not "public officials." At the same time, the trial court entered an order that the defendants produce and disclose the names of all confidential informants and produce additional information. It had determined that such disclosure was essential to prevent injustice to the plaintiffs for the following reasons:

> 1) That there is an issue as to the reliability of the confidential informants; that, unless Defendants be required to disclose the identity . . . , Plaintiffs shall be denied any opportunity to test the reliability and credibility of such informants and the existence, or lack of it, of Defendants' good faith, actual malice, and/or reckless disregard for the truth or falsity of the matters broadcast . . . .
>
> . . . .
>
> 3) That from the affidavits, depositions and statements produced at the hearing on the motion for disclosure *it appears that the Defendants have waived their right to confidentiality by inviting the following persons to have access to the information*: [five persons listed] [Emphasis added]

> The testimony from the hearing on the motions and from the depositions indicates that these people have heard the tapes of the alleged confidential informants and been made aware of the alleged informants' identities, and/or have participated in interviews with the alleged confidential informants; that said persons are neither attorneys nor employees of KOB or Hubbard Broadcasting Company and stand in no position or privity or privilege with regard to such alleged confidential information or informants.
>
> 4) That the parties have raised, through testimony and affidavits, a question of the reliability of the alleged confidential information and the credibility of the alleged confidential informants and Defendants' alleged confirmation of such information; that the only reliable way to assertain [sic] the credibility of such informants and the truth of the information related by such informants herein, is to allow Plaintiffs to have access to the identity of, and the recorded statements made by, the informants, and to be allowed to cross-examine the informants on the truth of the assertions claimed to have been made by such informants.

Defendants appealed this order to the Supreme Court and the appeal was dismissed. The Court held unconstitutional § 20-1-12.1, N.M.S.A. 1953 (Repl. Vol. 4, 1975 Supp.) pertaining to the right of nondisclosure by journalists and newscasters. Ammerman v. Hubbard Broadcasting, Inc., 89 N.M. 307, 551 P.2d 1354 (1976). The above Order of Disclosure remains in effect.

Thereafter, the trial court entered an order detailing the procedure to be followed in disclosing the identity of confidential informants, the transcription of certain tape records, and providing for *in camera* review. This order also remains in effect.

However, at a later date set for hearing on various motions, without notice or request by attorneys and to the surprise of all parties, the trial court presented and filed a document called "MEMORANDUM OPINION AND JUDGMENT OF DISMISSAL". The judgment of dismissal vacated and set aside the previous order that denied defendants' summary judgment, and granted defendants' motions for summary judgment. All plaintiffs' complaints were dismissed with prejudice. In its memorandum, the trial court stated in its own research it discovered the case of Rosenbloom v. Metromedia, 403 U.S. 29, 91 S.Ct. 1811, 29 L.Ed.2d 296 (1971), and this case was dispositive of the issues because it was applicable to private individuals. The trial court found in pertinent part:

> 4. There is no substantial evidence . . . or testimony that the defendants . . . acted maliciously, or with knowledge of the falsity of any of the alleged defamatory statements or with reckless disregard of whether the statements were false or not.
>
> 5. [The plaintiffs were private individuals.]
>
> . . .
>
> 7. The disclosure of the defendants' confidential informants and the taped interviews would not be calculated to discover evidence that would tend to establish malice or reckless conduct by the defendants, and therefor [sic] entry of summary judgment should not be delayed, Cervantes v. Time, Inc., 464 F.2d 986.

B. *Deputy sheriffs are public officials.*

A deputy sheriff is a public officer. State ex rel. Baca v. Montoya, 20 N.M. 104, 146 P. 956 (1915), held that a deputy county assessor who is required by statute to take an official oath is a public officer. A deputy sheriff is required by statute to take an official oath. Section 5-1-13(C), N.M.S.A. 1953 (Repl. Vol. 2, pt. 1). A deputy sheriff and a deputy county assessor are in the same class.

A deputy sheriff, a deputy marshall, a police officer, from the lowest to the highest rank in municipalities, are public officials. Time, Inc. v. Pape, 401 U.S. 279, 91 S.Ct. 633, 28 L.Ed.2d 45 (1971); Cline v. Brown, 24 N.C.App. 209, 210 S.E.2d 446 (1974); Rowden v. Amick, 446 S.W.2d 849 (Mo.App. 1969); Moriarity v. Lippe, 162 Conn. 371, 294 A.2d 326 (1972); Scelfo v. Rutgers University, 116 N.J.Super. 403, 282 A.2d 445 (1971); Jackson v. Filliben, 281 A.2d 604 (Del. 1971); Coursey v. Greater Niles Township Publishing Corp., 40 Ill.2d 257, 239 N.E.2d 837 (1968). See Annot., Libel and Slander: Who Is a Public Official, etc., 19 A.L.R.3d 1361 (1968).

The finding of the trial court that deputy sheriffs were not public officials was erroneous.

C. *Defendants failed to make a prima facie showing of lack of "actual malice."*

Defendants claim that "plaintiffs failed to produce proof of actual malice, making summary judgment for defendants appropriate." On motion for summary judgment, plaintiffs did not have this burden of proof. No trial took place. Summary judgment was entered. "Unquestionably the burden was on defendants to show an absence of a genuine issue of fact, or that they were

entitled as a matter of law for some other reason to a summary judgment in their favor. [Citations omitted]. However, once defendants had made a prima facie showing that they were entitled to summary judgment, the burden was on plaintiff to show that there was a genuine factual issue and that defendants were not entitled as a matter of law to summary judgment." Goodman v. Brock, 83 N.M. 789, 792, 498 P.2d 676 (1972). When a pleading or affidavit is properly made and is uncontroverted, it may be taken as true for purposes of passing upon the motion for summary judgment.

Plaintiffs' complaint charged defendants with malicious falsification of the statements broadcast. Depositions and affidavits were filed. At this stage of the proceedings, plaintiffs did not have to prove anything. On motion for summary judgment in a defamation action, the defendants had the burden of removing the issue of actual malice from the case, Tagawa v. Maui Publishing Company, 427 P.2d 79, 84 (Hawaii, 1967), through uncontroverted depositions and affidavits, Tagawa v. Maui Publishing Company, 448 P.2d 337 (Hawaii, 1968). We do not believe defendants have removed "actual malice" from the case.

"Actual malice" in a defamation action means that KOB aired statements with knowledge of their falsity or with a reckless disregard of whether they were true or false. "Reckless disregard" means evidence that KOB had a high degree of awareness of probable falsity, or KOB entertained serious doubts as to the truth of the statements, but nevertheless aired the statements. McNutt v. New Mexico State Tribune Company, 88 N.M. 162, 538 P.2d 804 (Ct.App. 1975).

This rule originated with New York Times Co. v. Sullivan, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686, 95 A.L.R. 2d 1412 (1964). It resolved a conflict between the con-

stitutional doctrine of freedom of the press and the right of a public official not to be defamed. This conflict had to be measured by standards that satisfied the First Amendment to the Constitution of the United States on the principle of free speech. The constitutional safeguard was that the media had the right to an unfettered interchange of ideas to bring about such political and social changes that the people desired. Under this safeguard, we are committed to the principle that the media has the right to vehement, caustic, and unpleasantly sharp criticism of government and public officials. "But there is no constitutional value in false statements of fact. Neither the intentional lie nor the careless error materially advances society's interest in 'uninhibited, robust, and wide-open' debate on public issues." Gertz v. Welch, 418 U.S. 323, 94 S.Ct. 2997, 41 L.Ed. 2d 789, 805 (1974).

We must distinguish wide-open criticism from defamation. By criticism we mean a broadcast that finds fault with the methods, policies and intentions of a public official. By defamation, we mean the circulation of a damaging falsehood against a public official. We commend wide-open criticism of public officials, but we do not commend broadcasts that defame the good name and reputation of a public official. If the media launch the publication knowing that it could ruin the reputation of a public figure, the public official becomes a victim. Nevertheless, the victim is given a heavy burden of proving culpability on the part of the publisher or broadcaster. One reason many cases result in summary judgment is that the victim's burden is difficult and in many cases impossible to meet, inasmuch as affirmative evidence of a knowing state of mind cannot be produced. See, Annot., Libel And Slander: What Constitutes Actual Malice, Within Federal Constitutional Rule Requiring Public Officials and Public Figures to Show Actual Malice, 20 A.L.R.3d 988 (1968).

We affirm the imposition of this burden on the victim because the media are entitled to the protection of the First Amendment standards fixed by the courts, standards by which they are safeguarded. Self-censureship should not be imposed on the media except where "actual malice" is proven by the victim with clear and convincing evidence. Rosenbloom v. Metromedia, Inc., supra.

Following *New York Times Co.*, supra, the Supreme Court of the United States defined "reckless conduct" as false publication made by the media with a high degree of awareness of probable falsity, or sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of the publication. St. Amant v. Thompson, 390 U.S. 727, 88 S.Ct. 1323, 20 L.Ed.2d 262 (1968).

These are the rules adopted by this Court in *McNutt*, supra.

Under the doctrine of "reckless conduct," "[f]ailure to investigate does not in itself establish bad faith." *St. Amant*, supra [390 U.S. at 733]. Whether the failure of the media to investigate constitutes sufficient proof of "reckless disregard" in publication of the truth depends upon the state of the record. Beckley Newspapers Corp. v. Hanks, 389 U.S. 81, 88 S.Ct. 197, 19 L.Ed.2d 248 (1967). Restatement, Torts (Second) § 580A, Comment (d), says:

> Availability of sufficient time and opportunity to investigate the truth of the statement is a significant factor in determining whether the publisher was negligent (see § 580B, Comment *h*), *and it may have some relevance in determining whether the publisher acted with reckless disregard as to truth or falsity.* [Emphasis added]

We must bear in mind that KOB had an absolute, unconditional privilege to publish its criticism of the Sheriff's Department. Its broadcast was directed to that fact. But in these broadcasts specific defamatory statements were made against individual deputy sheriffs. We are now at the summary judgment stage of the proceedings.

The burden was on the defendants to make a prima facie showing that the statements aired were true, and if false, that defendants did not air the broadcasts with actual malice. Substantial truthfulness is a defense to an action for defamation. Franklin v. Blank, 86 N.M. 585, 525 P.2d 945 (Ct.App. 1974).

Defendants' brief is replete with what plaintiffs failed to prove but nothing of what defendants proved. We have examined five volumes of the transcript and two depositions separately filed in this Court. We have gleaned the following facts from the record.

Defendants established through depositions taken by them of Landavazo, Ammerman and Golden that the following statements were false:

(a) That Landavazo spent time in the Arizona penitentiary.

(b) That Golden and Webb were at a race track in Santa Fe, not on any assigned case, and misused taxpayers' funds in the use of County vehicles.

(c) That Ammerman made two trips to El Paso to transport an illegal alien back to New Mexico to serve as a housekeeper to Sheriff Wilson, and that she was chosen because her "fate" was of personal interest to Ammerman.

We can find no evidence that defendants were free of actual malice in making the broadcasts.

The only evidence of record produced by defendants, generally applicable, was the cross-examination of Zani by his attorney at a deposition. Zani stated that he had reason to believe the statements aired in the broadcast were true and not false, and the information would be beneficial to the public.

With reference to Landavazo, Zani and Dimond, by affidavit, related the investigation of Landavazo and other information given them by confidential informants. They say that this information was checked out and it was true. The truth could only be determined by contacting Landavazo, the Arizona State Penitentiary or the Federal Bureau of Investigation. They telephoned Landavazo at home at 2:00 a.m. and awakened him from sleep. Landavazo was angry and did not answer the question. They called an agent of the Federal Bureau of Investigation in Albuquerque and he told them it was against policy to release such information. Yet the plaintiffs filed a negative report from the F.B.I. By deposition, Zani was asked whether he ever called the Arizona State Penitentiary, and his answer was *"No, sir. Again, I was not concerned about time, the prison time."* The Custodian of Records of the Arizona State Penitentiary, by affidavit, stated that the information was available to anyone who would call. Zani and Dimond did not verify the truth of the statement aired because they were not concerned about prison time. Yet, they say they published all of the informants' statements in good faith and without malice, believing their statements were true.

With reference to Ammerman, Joseph P. Collins, Jr., Chief of Detectives for Sheriff Wilson, by affidavit, stated that prior to the broadcast, Richard McKee, general manager of KOB, arranged for a meeting at his office at Radio Station KOB. Also present were Zani and Dimond. They

questioned him about Ammerman's trip to El Paso. He "told them that if they had information that Mr. Ammerman had transported a wet back maid from Juarez that it was absolutely false."

Plaintiff Webb, by affidavit, stated that he had a conversation with Zani sometime between June 24th and August 1, 1975, regarding the allegations published in the broadcasts as follows:

> During that conversation, Leo Zani admitted to me that he knew that many of the allegations made during all of the broadcasts which are the subject matter of the consolidated lawsuits were untrue, but were nevertheless broadcast because "they were news."

Dimond testified that when she began the investigation of the Sheriff's Department, she received hundreds of anonymous telephone calls. Many times she heard back from the same people and she didn't know whether she ever met them. When asked what information the anonymous callers gave, she said "I can't even begin to tell you everything." She checked out the information and it "usually panned out. If it didn't, we dropped it." Her profession of good faith may not have been based "wholly" on the unverified *anonymous* telephone calls, but defendants denied plaintiffs the names of the confidential informants and the right to determine what information was given from anonymous callers who became confidential informants.

There were obvious reasons to doubt the veracity of the informants because the trial court found that the credibility of the confidential informants and the reliability of the confidential information had been established as an issue in the case.

St. Amant v. Thompson, supra, says:

> The defendant in a defamation action brought by a public official cannot, however, automatically insure a favorable verdict by testifying that he published with a belief that the statements were true. The finder of fact must determine whether the publication was indeed made in good faith. *Professions of good faith will be unlikely to prove persuasive, for example, where a story* is fabricated by the defendant, is a product of his imagination, *or is based wholly on an unverified anonymous telephone call.* Nor will they be likely to prevail when the publisher's allegations are *so inherently unprobable* that only a reckless man would have put them in circulation. *Likewise, recklessness may be found where there are obvious reasons to doubt the veracity of the informant or the accuracy of his reports.* [Emphasis added] [390 U.S. at 732]

Defendants' challenged statements have been traced to unidentified sources. They were not traced to an identified source. When a defendant traces his challenged statements to an *identified* source, it does not constitute a "reckless disregard for the truth." New York Times Company v. Connor, 365 F.2d 567 (5th Cir. 1966).

There was no evidence that defendants lacked knowledge as to the falsity of the statements, nor any evidence that they lacked a high degree of awareness of probable falsity or that they did not entertain any serious doubts as to the truth or the statements aired. Defendants failed to make a prima facie showing of lack of actual malice.

D. *There are genuine issues of material fact as to Ammerman and Landavazo.*

Ammerman presented evidence by Collins that, prior to the broadcast of June 13, 1975, Collins told KOB that any information that Ammerman had transported a wetback maid from Juarez was absolutely false. This was evidence that KOB knew it was false and yet KOB aired this false information.

KOB presented evidence that it did not call the Arizona State Penitentiary to verify any imprisonment of *Landavazo* because it was not concerned with prison time. This evidence presents an issue of fact as to whether the broadcast was aired with a reckless disregard of the truth.

Ammerman and Landavazo have established that genuine issues of material fact exist on the issue of actual malice.

E. *Summary judgment was premature as to Golden and Webb.*

With reference to Golden and Webb, defendants must produce evidence by deposition or affidavit that defendants did not have knowledge of the falsity of statements made by KOB or that defendants did not broadcast the false statements with reckless disregard of the truth. If this duty is performed, the burden shifts to Golden and Webb to establish that a genuine issue of material fact exists.

Defendants' statements were based solely on the confidential sources in question.

In Peagler v. Phoenix Newspapers, Inc., 114 Ariz. 309, 560 P.2d 1216 (1977), the defendant published an article about plaintiff written by Albert Sitter, a reporter. In the article, Mrs. Runser of the Phoenix office of the

Better Business Bureau allegedly told the reporter that plaintiff was one of three firms with the longest record of unresolved consumer complaints that were allowed to remain members of BBB. Summary judgment was granted defendant. It was reversed. Mrs. Runser was asked this question, to which she made this answer:

> Q. "Did you tell him [Sitter] in any context that the greatest number of complaints on file at the Better Business Bureau against any one company was lodged against Peagler's Dodge City?"
>
> A. "No."

The Court said:

> The jury could, therefore, have concluded that Sitter was aware that the article was false or that he published it in a reckless disregard of whether it was true or false. [560 P.2d at 1223]

Webb's affidavit does not meet the specificity set forth in *Peagler*. It stated that in a conversation with Zani:

> . . . Leo Zani admitted to me that he knew that many of the allegations made during all of the broadcasts . . . were untrue, but were nevertheless broadcast because "they were news".

Zani's admission was general in nature and it is questionable whether "many of the allegations made" included Webb and Golden. "Many allegations made" does not mean "all allegations made." The broadcast referred to persons and events not included in these judicial proceedings. Inferences of a general nature can be drawn, but in order to make the inferences applicable to Gordon and Webb, as well as Ammerman and Landavazo, the

circumstances surrounding the conversation must be amplified to determine the extent of the admission and what reasonable inferences can be drawn to determine whether the particular statements broadcast were admitted to be untrue. To create an issue of material fact, the affidavit must be based upon facts known to the affiant. These facts must be stated clearly and unequivocally.

If defendants' lack of actual malice is uncontroverted, the defendants are entitled to summary judgment against Golden and Webb.

Plaintiffs claim that the summary judgment is premature because they were denied additional discovery; that the denial of disclosure of the names of the confidential informants, and the information they would disclose was essential. This claim is valid if plaintiffs are entitled to the names and testimony of these confidential informants.

The First Amendment does not grant a broadcaster any privilege qualified or absolute, to refuse to reveal confidential information which is admittedly relevant to a court proceeding. Dow Jones & Company, Inc. v. Superior Court, 364 Mass. 317, 303 N.E.2d 847 (1973); Carey v. Hume, 492 F.2d 631 (D.C. Cir. 1974); See Annot., Privilege of Newspaper or Magazine and Persons Connected Therewith Not to Disclose Communications, etc., 7 A.L.R.3d 591 (1966). Cervantes v. Time, Inc., 464 F.2d 986, 994 (8th Cir. 1972) says:

> *Where there is a concrete demonstration that the identity of defense news sources will lead to persuasive evidence on the issue of malice,* a District Court should not reach the merits of a defense motion for summary judgment until and unless the plaintiff is first given a meaningful opportunity to cross-

examine these sources, whether they be anonymous or known. For only then can it be said that no genuine issue remains to be tried. [Emphasis added]

To determine whether defendants' news sources will lead to persuasive evidence on the issue of malice, we are governed by Rule 510(c)(3) of the Rules of Evidence [§ 20-4-510(c)(3), N.M.S.A. 1953 (Repl. Vol. 4, 1975 Supp.)]. It reads in part:

If information from an informer is relied upon to establish the legality of the means by which evidence was obtained and the judge is not satisfied that the information was received from an informer reasonably believed to be reliable or credible, he may require the identy of the informer to be disclosed. *The judges may permit the disclosure to be made in camera or make any other order which justice requires.* [Emphasis added]

The trial court entered its order. The defendants have agreed to comply with this order. After an *in camera* inspection, the trial court will then determine whether the identity of the confidential informants will lead to persuasive evidence on the issue of actual malice This determination will include findings of whether defendants in fact had reliable sources, whether defendants misrepresented the reports of their sources, whether defendants had prior knowledge of falsity, and whether reliance upon these particular sources was reckless. Until the trial court renders its decision, summary judgment is premature.

Without holding an *in camera* proceeding, the trial court found that disclosure "would not be calculated to discover evidence that would tend to establish malice or reckless conduct by the deefndants, and therefor [sic] entry

of summary judgment should not be delayed, Cervantes v. Time, Inc., 464 F.2d 986." The trial court had overlooked its prior order of disclosure. *Cervantes* is not controlling in this case. In *Cervantes*, the summary judgment was affirmed because the Life reporter collected and documented data over a period of many months, and Life's key personnel spent countless hours corroborating and evaluating this data, and Cervantes was provided with hundreds of documents utilized in preparation of the article, and Cervantes deposed virtually every Life employee who possessed any connection whatever with the article's preparation and publication and, with one exception, *each affirmed his or her belief in the truth of the article*, and Cervantes made a minimal assault on the truth of the matter, and failed to produce a scintilla of proof supportive of a finding that either in fact entertained *serious doubts about the truth* of a single sentence in the article, and that the article was published in good faith without regard to the identity of the news sources.

The Court said:

Thus, if, in the course of pretrial discovery, [plaintiff] uncovers substantial evidence *tending to show* that defendant's published assertions are so inherently improbable *that there are strong reasons to doubt the veracity of the defense informant or the accuracy of his reports*, the reasons favoring compulsory disclosure in advance of a ruling on the summary judgment motion should become more compelling. Similarly, where pretrial discovery produces *some factor* which would support the conclusion that the defendant in fact entertained serious doubt as to the truth of the matters published, identification and examination of defense news sources seemingly would be in order, and traditional summary judgment doctrine would command

pursuit of further discovery prior to adjudication of a summary judgment motion. *The point of principal importance is that there must be a showing of cognizable prejudice before the failure to permit examination of anonymous news sources can rise to the level of error. Mere speculation or conjecture about the fruits of such examination simply will not suffice.* [Emphasis added] [464 F.2d at 994]

Cervantes supports the trial court's order that an *in camera* proceeding be held because plaintiffs produced substantial evidence that there were strong reasons to doubt the veracity of the defense informants. The trial court delayed summary judgment until it changed the course of proceedings and entered summary judgment. This was reversible error.

Apart from the issues in the case, defendants presented several affidavits, one by a confidential informant, that one of the plaintiffs was a brutal, vicious person who would seek retribution. This factor may have influenced the change of course. We appreciate the serious consequences that may flow from disclosure, but we also know that anger and hatred often flow emotionally when informants make false accusations that impugn the character and reputation of a public officer. The heavy burden of determining disclosure of defense informants rests on the trial court.

Summary judgment is reversed. This case is remanded to the trial court to allow defendants to make an additional showing that there was no actual malice with reference to Golden and Webb; that Golden and Webb be allowed to make an additional showing that there was actual malice; that the trial court hold an *in camera* proceeding to determine whether informants are reliable

persons and the reports given are accurate, and render a decision whether defense informants should be disclosed to all plaintiffs. Defendants' motion for summary judgment may then be considered with reference to Golden and Webb and a decision rendered thereon.

IT IS SO ORDERED.

/s/ Lewis Sutin
Judge

We concur:

/s/ (Illegible) J.

/s/ (Illegible) D.J.

APPENDIX C

IN THE SUPREME COURT OF THE
STATE OF NEW MEXICO

Tuesday, December 27, 1977

No. 11,724

HUBBARD BROADCASTING, INC.,
et al.,
Petitioners,

vs.

M. A. AMMERMAN, et al.,
Respondents.

ORIGINAL PROCEEDING ON CERTIORARI

This matter coming on for consideration by the Court upon petition for writ of certiorari, and the Court having considered said petition and being sufficiently advised in the premises;

NOW, THEREFORE, IT IS ORDERED that petition for writ of certiorari be and the same is hereby denied.

IT IS FURTHER ORDERED that the Record in Cause No. 2818 be and the same is hereby returned to the Clerk of the Court of Appeals.

APPENDIX D

551 P.2d 1354

M. A. AMMERMAN, James D. Webb, Jim Golden and Jerry Landavazo, Plaintiffs-Appellees,

v.

HUBBARD BROADCASTING, INC., et al., Defendants-Appellants.

No. 10937.

Supreme Court of New Mexico.

June 29, 1976.

In consolidated cases, wherein plaintiffs sought to recover from defendants for alleged slanderous radio broadcasts, news reports or newscasts, defendants appealed from orders of the District Court, Bernalillo County, Richard B. Traub, D. J., by which defendants were ordered to make disclosure of claimed confidential informants and to produce all information claimed to have been received from alleged informants. The Supreme Court, Oman, C. J., held that under the Constitution, statutes purporting to regulate practice and procedure in the courts cannot be binding. The statute by which the legislature purported to create a privilege for a journalist or newscaster or working associate of a journalist or newscaster from disclosure in judicial proceeding of information obtained in gathering, receiving or processing information for any medium of communication to the public is constitutionally invalid. Notwithstanding a statute purporting to grant such privilege to journalist or newscaster unless disclosure be essential to prevent injustice and providing for de novo appeal from the order for disclosure, the appeal to be

heard within 20 days from date of docketing, the time within which the Supreme Court was to consider the matter was a matter for the Supreme Court to determine, and its review of evidence was only for the purpose of determining whether there was substantial evidence to support the trier of facts; the legislature had no power to determine and define nature of the appellate process, establish procedures to be followed in that process and fix time limitations within which the Supreme Court was required to act.

Appeal dismissed.

1. Witnesses (Key) 196

Statutory privilege, insofar as seeking to protect journalist or newscaster or working associate of journalist or newscaster from disclosure in judicial proceeding of information obtained in gathering, receiving or processing information for any medium of communication to public did nothing more nor less than attempt to create rule of evidence comparable to other statutory privileges. Rules of Evidence, rules 502-510.

2. Courts (Key) 85(3)

Rules of Evidence as adopted are procedural. 1953 Comp. § 20-1-12.1, subd. A; Rules of Evidence, rules 502-510.

3. Constitutional Law (Key) 55

Under Constitution, legislature lacks power to prescribe by statute rules of evidence and procedure, and statutes purporting to regulate practice and procedure in the courts cannot be binding. 1953 Comp. §§ 20-1-12.1, 20-1-12.1, subds. A, C; Const. art. 6, § 3; Rules of Evidence, rules 502-510; Federal Rules of Evidence, rule 501, 28 U.S.C.A.

4. Witnesses (Key) 185

Statute by which legislature purported to create privilege for journalist or newscaster or working associate of journalist or newscaster from disclosure in judicial proceeding of information obtained in gathering, receiving or processing information for any medium of communication to public is constitutionally invalid and cannot be relied upon or enforced in judicial proceedings. 1953 Comp. § 20-1-12.1, subd. A; Const. art. 6, § 3.

5. Constitutional Law (Key) 55, 56

Legislature has power to determine in what district court cases, civil and criminal, Supreme Court shall exercise appellate jurisdiction, except that appellate jurisdiction is directly conferred on Supreme Court by Constitution in those cases in which district court has imposed sentence of death or life imprisonment, but legislature has no power to substitute de novo hearing for appeal from judgment or order of district court, and has no power to fix time within which an appeal must be heard by Supreme Court. Const. art. 6, § 2; 1953 Comp. § 20-1-12.1, subd. C; Rules of Criminal Appellate Procedure, rules 101-604; Rules Governing Appeals, rules 1-32; Supreme Court Rules, rules 5-17.

6. Constitutional Law (Key) 55

Notwithstanding statute purporting to grant privilege to jouranlist or newscaster unless disclosure be essential to prevent injustice and providing for de novo appeal from order for disclosure, the appeal to be heard within 20 days from date of docketing, time within which Supreme Court was to consider matter was matter for Supreme Court to determine, and its review of evidence was only for purpose of determining whether there was substantial

evidence to support trier of facts; legislature had no power to determine and define nature of the appellate process, establish procedures to be followed in that process and fix time limitations within which Supreme Court was required to act. 1953 Comp. §§ 20-1-12.1, 20-1-12.1, subds. A, C; Rules of Evidence, rules 502-510; Const. art. 4, § 23; art. 6, §§ 2, 3; Rules of Criminal Appellate Procedure, rules 101-604; Rules Governing Appeals, rules 1-32; Supreme Court Rules, rules 5-17.

Modrall, Sperling, Roehl, Harris & Sisk, Leland S. Sedberry, Albuquerque, for defendants-appellants.

Fred M. Calkins, Albuquerque, for Ammerman.

Marchiondo & Berry, Mary C. Walters, Albuquerque, for Webb & Golden.

Branch & Branch, Albuquerque, for Landavazo.

OPINION

OMAN, Chief Justice.

These are five consolidated cases in which the plaintiffs seek recovery from defendants for alleged slanderous radio broadcasts, news reports or newscasts. The cases are before us on appeal by the defendants from an order of the district court by which defendants were ordered to disclose the names of all of their claimed confidential informants and to produce, by delivery or making available to plaintiffs, all information defendants claim to have received from their alleged informants, including documents and tapes.

The appeal from this order was taken pursuant to § 20-1-12.1, N.M.S.A.1953 (Supp.1975), which was adopted

by our Legislature on March 10, 1973 and which became effective June 15, 1973. N.M. Const. art. 4, § 23; *Garcia v. J. C. Penney Co.*, 52 N.M. 410, 200 P.2d 372 (1948). The statute provides in pertinent part:

> "A. Unless disclosure be essential to prevent injustice, no journalist or newscaster, or working associates of a journalist or newscaster, shall be required to disclose before any proceeding or authority, either:
>
> "(1) the source of any published or unpublished information obtained in the gathering, receiving or processing of information for any medium of communication to the public; or
>
> "(2) any unpublished information obtained or prepared in gathering, receiving or processing of information for any medium of communication to the public.
>
> "B. For the purpose of this act:
>
> "(1) 'proceeding or authority' includes any proceeding or investigation before, or by, any legislative, judicial, executive or administrative body or person;
>
> "* * *
>
> "C. If the proceeding in which disclosure is sought is in the district court, that court will determine whether disclosure is essential to prevent injustice. In all other proceedings, application shall be made to the district court of the county in which the proceeding is being held for an order for disclosure. Disclosure shall, in no event, be ordered except upon written order of the district court stating the reasons why disclosure is essential to prevent injustice. Such an order is appealable to the Supreme Court if the appeal is docketed in that court within ten [10] days

after its entry. The matter shall be considered as an extraordinary proceeding and shall be heard de novo and within twenty [20] days from date of docketing. The taking of an appeal shall operate to stay proceedings as to the prevention of injustice issue only in the district court."

The plaintiff filed a motion to dismiss the appeal upon the ground that § 20-1-12.1(C), supra, pursuant to which the appeal was taken, is unconstitutional. However, at the request of the court, the constitutionality of the purportedly created privilege, as well as that of the procedures to be followed in judicial proceedings before the district court and on appeal before this court, was presented to us by both sides in oral arguments and in a brief submitted by defendants.

The appeal was dismissed and we entered an order holding that the privilege, or prohibition against disclosure, which the Legislature created by Subsection A of the statute, may not be asserted or relied upon in a judicial proceeding, and the procedural matters set forth in Subsection C of the statute are also largely invalid. We announced that an opinion would follow, and it is pursuant to that announcement that the present opinion has been prepared and is being published.

[1] The privilege which the Legislature created, insofar as it sought to protect a journalist or newscaster, or working associate of a journalist or newscaster, from disclosure in a judicial proceeding of information obtained in gathering, receiving or processing of information for any medium of communication to the public, did nothing more nor less than attempt to create a rule of evidence, comparable to the other privileges embraced within Rules 502 to 510 of the New Mexico Rules of Evidence [§§

20-4-502 to -510, N.M.S.A.1953 (Supp.1975)]. These rules were adopted by order of this court entered April 26, 1973 and became effective July 1, 1973 as to all cases filed in the courts of New Mexico on or after that date. The rules were made applicable "to trials and proceedings in the courts of New Mexico," and we equate these with "judicial proceedings" as used in § 20-1-12.1, supra. Certainly the cases now before us were "judicial proceedings," since they were cases filed in the district court of New Mexico, and they were filed after July 1, 1973.

There can be no real question about rules of privilege being rules of evidence, when considered in the context of being exceptions to the general requirement and liability of everyone to give testimony or furnish evidence upon all facts inquired of in a court of justice. They are so considered by every authority about whom we know who has discussed such rules. See, e. g., 8 J. Wigmore, Evidence § 2285, at 527 (J. McNaughton rev. 1961); 3 S. Gard, Jones on Evidence, Civil and Criminal § 21:1, at 744 (6th ed. 1972); N.M.R. Evid. 501, supra; Rule 501 of Rules of Evidence for United States Courts and Magistrates, 28 U.S.C., app., Rule 501 (Supp. IV, 1974); Donnelly, The Law of Evidence: Privacy and Disclosure, 14 La. L.Rev. 361 (1953-54); Report of the Committee on Improvement of the Law of Evidence, American Bar Association, Section on Judicial Administration (1938); Carter, The Journalist, His Informant and Testimonial Privilege, 35 N.Y.U.L.Rev. 1111 (1960); Morgan, Rules of Evidence-Substantive or Procedural?, 10 Vand.L. Rev. 467 (1956-57); Annot., 7 A.L.R.3d 591 (1966); Model Code of Evidence rules 201-234 (1942); McCormick's Handbook of the Law of Evidence § 72, at 151 (2d ed. E. Cleary 1972). In fact, if we correctly understand the brief of defendants and their argument, they recognize and concede that a

testimonial privilege in a judicial proceeding constitutes an evidentiary rule.

As stated by Professor Edmund M. Morgan in his excellent article, Rules of Evidence-Substantive or Procedural?, supra:

> "[The common law privileges] are nothing more or less than privileges to suppress the truth, and no officers of any department of government, other than the judiciary, have the constant opportunity to observe them in operation and the skill to determine how far and in what respects they interfere with the orderly and effective administration of justice.
>
> "* * *. It follows that such a provision [constitutional or statutory recognizing or conferring upon the courts the power of regulating procedure] should be interpreted as vesting in the courts the power to make rules of evidence, including those governing competency and privileges of witnesses and privileged communications."
>
> 10 Vand.L.Rev. at 483-84.

It is equally true that rules of evidence are procedural, in that they are a part of the judicial machinery administered by the courts for determining the facts upon which the substantive rights of the litigant rest and are resolved. Rules of evidence do no more than regulate the method of proceeding by which substantive rights and duties are determined. Pleading, pretrial, all rules of evidence (including rules of presumption and privilege) and other trial and post-trial mechanisms, designed to accomplish a just determination of rights and duties granted and imposed by the substantive law, are traditionally considered to be "adjective law" or "procedural law." See *McCarthy v. Arndstein*, 266 U.S. 34, 41, 45 S.Ct. 16, 17, 69 L.Ed. 158, 161 (1924); Clapp, Privilege Against Self-Incrimination, 10 Rutgers L.Rev. 541, 571 (1955-56).

[2] We are aware that the line between substance and procedure is often elusive and that authorities, in endeavoring to follow this dichotomy in the rule-making process, are not always in accord. However, we are convinced that rules of evidence, by reason of the function they serve in the judicial process, are very largely, if not entirely procedural. See 1 J. Wigmore, Evidence § 1(c), at 3 (3d ed. 1940); 1 S. Gard, Jones on Evidence, Civil and Criminal § 1:14, at 19 (6th ed. 1972); Clapp, supra; Morgan, supra. The very fact of adoption of the New Mexico Rules of Evidence, supra, by this court, is conclusive of its determination that at least these rules as adopted are procedural.

The next issue to be resolved is whether rules of procedure in judicial proceedings are matters for this court to fashion and adopt, or matters for the Legislature to adopt, or matters which may properly be adopted by either or both the Legislature and this court. In *State v. Roy*, 40 N.M. 397, 60 P.2d 646 (1936), 110 A.L.R. 1 (1937), we held that the power of this court to promulgate rules regulating pleading, practice and procedure for our district courts was a power vested in this court by N.M.Const. art. 6, § 3, in that this section of our Constitution grants this court "superintending control over all inferior courts." In furtherance of this holding and as to its extent, it was stated:

> "The powers essential to the functioning of courts, in the absence of the clearest language to the contrary in the constitution, are to be taken as committed solely to us to avoid a confusion in the methods of procedure and to provide uniform rules of pleading and practice."
>
> 40 N.M. at 421, 60 P.2d at 661.

In referring to a review of an exhaustive annotation in 51 L.R.A. 1, 111 (1901), relating to the power of "superintending control," or "supervisory control" as phrased in many constitutions, including our own, it was stated:

> "A review of all the cases therein enumerated clearly leads us to but one conclusion. It is this: That the power to provide rules of pleading, practice, and procedure for the conduct of litigation in the district courts, as well as rules of appellate procedure, is lodged in this court by the Constitution of New Mexico.
>
> "* * *.
>
> "Being satisfied as we are that chapter 84 is not a grant of power, there is nothing violative of fundamental law or the Constitution in this, the highest judicial body in the state, to prescribe rules for an inferior judicial body."

40 N.M. at 422-23, 60 P.2d at 662.

It is true that this court in its opinion declined to hold that its power and right to promulgate rules of pleading, practice and procedure is an exclusive one over which the Legislature has no control. It was observed that at the time there was no conflict between any rule promulgated by the court and any law enacted by the Legislature, and that when such a conflict arose it would then be time to decide which is paramount in the rule-making field, the court or the Legislature.

In the later case of *State v. Arnold*, 51 N.M. 311, 183 P.2d 845 (1947), a conflict did arise. A statute provided:

> "Within six months from the entry of any final judgment in any civil action, any party aggrieved may appeal therefrom to the supreme court of the State."

The applicable rule of this court provided:

> "Within three months from the entry of any final judgment in any civil action, any party aggrieved may appeal therefrom to the Supreme Court."

In resolving the conflict, the court reaffirmed its rule-making power, but it is not certain whether it was relying on its constitutional power to do so, as was clearly enunciated in *State v. Roy*, supra, or upon a statutory authority. However, it was held in the *Arnold* case that the rule modified the statute and the time limitation for taking an appeal as provided in the rule prevailed over the time limitation provided in the statute. In the more recent case of *State ex rel. Anaya v. McBride*, 88 N.M. 244, 246, 539 P.2d 1006, 1008 (1975), we held:

> "Our constitutional power under N.M.Const. art III, § 1 and art. VI, § 3 of superintending control over all inferior courts carries with it the inherent power to regulate all pleading, practice and procedure affecting the judicial branch of government. *State v. Roy*, 40 N.M. 397, 60 P.2d 646 (1936). See also *Alexander v. Delgado*, 84 N.M. 717, 507 P.2d 778 (1973); *Sitta v. Zinn*, 77 N.M. 146, 420 P.2d 131 (1966); *State v. Arnold*, 51 N.M. 311, 183 P.2d 845 (1947); *City of Roswell v. Holmes*, 44 N.M. 1, 96 P.2d 701 (1939); cf. *State v. Gunzelman*, 85 N.M. 295, 512 P.2d 55 (1973).
>
> "Under the Constitution, the legislature lacks the power to prescribe by statute rules of practice and procedure, although it has in the past attempted to do so. Certainly statutes purporting to regulate practice and procedure in the courts cannot be made binding, for the constitutional power is vested exclusively in this court."

[3, 4] We reaffirm this language from our opinion in *State ex rel. Anaya v. McBride,* supra, and observe that we are again confronted with a conflict between a statute and a rule of this court, to wit, § 20-1-12.1(A), supra, and Rule 501 of the New Mexico Rules of Evidence, supra. That rule provides:

> *"Privileges recognized only as provided.*
>
> "Except as otherwise required by constitution, and except as provided in these rules or in other rules adopted by the Supreme Court, no person has a privilege to:
>
> "(1) Refuse to be a witness; or
>
> "(2) Refuse to disclose any matter; or
>
> "(3) Refuse to produce any object or writing; or
>
> "(4) Prevent another from being a witness or disclosing any matter or producing any object or writing."

In view of our clear and unambiguous assertion in Rule 501 that no person has a privilege, except as provided by constitution or rule of this court—and no rule of this court grants a privilege to a journalist or newscaster—and in view of our equally plain and unambiguous assertion in our opinion in *State ex rel. Anaya v. McBride,* supra, that under our Constitution the Legislature lacks power to prescribe by statute rules of evidence and procedure, this constitutional power is vested exclusively in this court, and statutes purporting to regulate practice and procedure in the courts cannot be binding, we are able to reach no conclusion other than that the privilege purportedly created by § 20-1-12.1(A), supra, is constitutionally invalid and cannot be relied upon or enforced

in judicial proceedings. We in no way suggest that the privilege may or may not properly be asserted in any proceeding or investigation before, or by any legislative, executive or administrative body or person. No question as to the validity of the privilege to refuse to disclose information or the source thereof in any proceeding or investigation before any such body or person is before us.

We now turn our attention to the provisions concerning procedures set forth in Subsection C of the statute, which is quoted above. In the case now before us, we are concerned only with a case initiated in a court in which the defendants sought to rely upon the privilege. Since we have held the privilege may not be relied upon or enforced upon such a proceeding, the district court procedures for determining whether disclosure is essential to prevent injustice in such a judicial proceeding are necessarily of no force or effect. However, we do not pass upon the validity of the procedures prescribed for making application to the district court for an order of disclosure directed to a ruling of a legislative, executive or administrative body or person. This question is not before us.

[5] Unquestionably the Legislature has the power to determine in what district court cases, civil and criminal, this court shall exercise appellate jurisdiction, except that appellate jurisdiction is directly conferred on this court by our Constitution in those cases in which the district court has imposed a sentence of death or life imprisonment. N.M.Const. art. 6, § 2. However, the Legislature has no power to substitute a de novo hearing for an appeal from a judgment or order of the district court, and has no power to fix the time within which an appeal must be heard by this court.

[6] Although the review provided for in Subsection C of the statute refers to the order of the district court as being "appealable" to this court, and it is provided that the "appeal shall operate to stay proceedings," it is also provided that the matter "'shall be heard de novo and within twenty [20] days from date of docketing" in this court. A hearing "de novo" means a hearing anew, or all over again. *Southern Union Gas Company v. Taylor,* 82 N.M. 670, 486 P.2d 606 (1971). Such a hearing is totally inconsistent with our Rules of Appellate Procedure for Criminal Cases [§§ 41-23A-101 to -604, N.M. S.A.1953 (Supp.1975)], adopted by order dated June 24, 1975, which became effective September 1, 1975. It is also inconsistent with our Rules of Appellate Procedure for Civil Cases and Rules Governing Original Proceedings in the Supreme Court [§§ 21-12-1 to -32, N.M.S.A.1953 (Supp.1975)] which became effective April 1, 1974, and with all prior rules of this court governing appeals. See e. g., §§ 21-2-1(5) to -1(17), N.M.S.A.1953 (Repl.Vol. 4, 1970). In *New Mexico State Highway Department v. Bible,* 38 N.M. 372, 34 P.2d 295 (1934), we stated that an "appeal" involves a review of proceedings at a trial already had, not a new trial of the case, and is no part of the trial.

APPENDIX E

IN THE SUPREME COURT OF THE
STATE OF NEW MEXICO

Tuesday, October 12, 1976

No. 11,043

HUBBARD BROADCASTING, INC.,
LEO ZANI, RICHARD McKEE and
DIANE DIAMOND,
Petitioners,

vs.

HON. RICHARD B. TRAUB,
Respondent.

ORIGINAL PROHIBITION/SUPERINTENDING CONTROL PROCEEDING

This matter having heretofore been submitted and taken under advisement, and an order having been entered by the Court on September 16, 1976, quashing the alternative writ issued herein on July 21, 1976, and a motion for rehearing and clarification having been filed on September 24, 1976, and an order entered on September 29, 1976, denying said motion for rehearing;

NOW, THEREFORE, IT IS ORDERED that the order entered herein on September 16, 1976, quashing the alternative writ issued in the above entitled cause, be and the same is hereby made final.

Supreme Court, U. S.
FILED
APR 18 1978
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1323

HUBBARD BROADCASTING, INC., JERRY DANZIGER, RICHARD McKEE, LEO ZANI, DIANE DIMOND, JOHN DOE and JANE DOE, *Petitioners,*

vs.

M. A. AMMERMAN, JERRY LANDAVAZO, JAMES D. WEBB and JIM GOLDEN, *Respondents.*

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE NEW MEXICO COURT OF APPEALS

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In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1323

HUBBARD BROADCASTING, INC., JERRY DANZIGER, RICHARD McKEE, LEO ZANI, DIANE DIMOND, JOHN DOE and JANE DOE, *Petitioners*,

vs.

M. A. AMMERMAN, JERRY LANDAVAZO, JAMES D. WEBB and JIM GOLDEN, *Respondents*.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE NEW MEXICO COURT OF APPEALS

OPINIONS BELOW

The opinion of the Court of Appeals of the State of New Mexico reversing the District Court of Bernalillo County, included as Appendix A to the Petition, is erroneously stated to be not reported. It is reported, and cited as 91 N.M. ....., 572 P.2d 1258 (Ct. App.), cert. denied, ... N.M. ....., 572 P.2d 1257 (Ct. App. 1977). There is included in this brief our Appendix A, which is an Order on an Original Proceeding for a Writ of Prohibition or Superintending Control before the New Mexico Supreme Court. Appendix E to the Petition is the pro forma Order in the same proceeding denying a motion for rehearing and permanently quashing the writ.

JURISDICTION

Petitioners purport to invoke the jurisdiction of this Court under United States Supreme Court Rule 19(1)(a). Respondents submit that jurisdiction can be invoked only under 28 U.S.C.A. §1257(3), and urge that jurisdiction is improper, in that the judgment below is not final, as is argued in POINT II herein.

STATEMENT OF THE CASE

Statement of Facts Material to Consideration of the Questions Presented.

Respondents take issue with many of the factual matters set forth in the Petition. We respectfully set forth only those thought specifically relevant to the consideration of the Petition.

Petitioners' statement of facts recites that the District Court had determined that disclosure of confidential informants would not lead to evidence on actual malice. The Court of Appeals of New Mexico found, to the contrary, that the District Court had previously ordered disclosure, and had determined disclosure was necessary. (Petition Appendix 24-26). The Court of Appeals felt that the District Court had applied an erroneous legal standard, and that there was substantial evidence upon which to doubt the veracity of the defense informants. (Petition Appendix 26). The trial court's conflict arose because it entered orders and findings upon two separate occasions, though based upon identical evidence. Its findings differed on this issue.

Both the Court of Appeals and Supreme Court of New Mexico were impressed that Defendants (Petitioners herein) agreed to comply with the in camera hearing

procedure mandated below on the issue of disclosure of informants. (Petition Appendix 24, Appendix A to this brief). This factual finding is of paramount import, since the Petition is in large part predicated upon an argument that ordering disclosure of informants' identities, or at least ordering an in camera hearing, is a denial of their constitutional rights.

With respect to matters contained in Petitioners' statement of facts relating to individual respondents, there are additional facts relevant to the cases present. As to Lieutenant Mort Ammerman, he has denied that he made trips to El Paso, Texas for the purpose of obtaining an illegal alien to serve as housekeeper for the Sheriff, or that the alleged housekeeper's fate was of personal interest to him. (Transcript 596, 766, 767).[1] The material broadcast was not substantially true, since the record reflects all trips to the El Paso area were on official business. This was known to Petitioners prior to their broadcasts, on the basis of the Affidavit of Joseph P. Collins. (Transcript 614-615). Further, Ammerman states in an Affidavit of record that he spoke with Leo Zani, a Petitioner herein, approximately one month after the broadcasts in question, and that Zani admitted there was no truth to the assertion made in the broadcast that he violated federal law in transporting an illegal alien, or that he was interested in her fate. (Transcript 597-598).

With respect to Deputy Sheriff Jerry Landavazo, the record below reflects the allegations broadcast were absolutely false; Jerry Landavazo never served time in a penitentiary in Arizona or elsewhere. (Transcript 629). While the reporters were shown a rapsheet with Landavazo's name upon it, they admit they never had the

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1. References in the Statement of Facts to "Transcript" are references to the record below before the New Mexico Court of Appeals.

opportunity to read the contents of that document. (Transcript 1134). Knowledge of confinement in the Arizona State Penitentiary was a matter of public record, available to anyone. (Transcript 442). Finally, the nature of the telephone call by one of Petitioners to Landavazo must be set in proper perspective. The call was at 2:00 a.m. The individual calling refused to identify himself, refused to identify his mission or affiliation, and, so far as Landavazo knew, inexplicably asked if he had ever been in jail. After repeated failure of the caller to identify himself, Landavazo informed this apparent crank caller he did not have to answer questions like that, whereupon the caller terminated the conversation, still without any explanation. (Transcript 627-634).

With respect to Deputy Sheriffs Golden and Webb, the Petitioners herein relied upon a retraction by Lt. Golden that he had *written* orders to be at the Santa Fe racetrack on official business to justify a broadcast that he had no authority at all; that he and Sgt. Webb were not on official business; and that they had misused county credit cards. Sgt. Webb's testimony at the trial of Sheriff Wilson was deliberately ignored by Petitioners, however, since it was unfavorable to their contentions that Webb, too, was not in Santa Fe on official business. The truth of the allegations has not been established. Similarly, despite the decision in another hearing that Clara Lucero was removed from jail in violation of the court's orders (Petitioner's Brief, p. 9), the issue in this case is whether the broadcast concerning that incident was true. Sgt. Webb will show, at a trial on the merits, that Clara Lucero was removed from jail upon orders of another district judge of equal authority to the judge who found him in contempt. There is no evidence, other than in Petitioners' minds, that the Golden and Webb broadcasts were "substantially true." There are questions of fact which precluded entry of summary judgment.

ARGUMENT

POINT I

The Decision of the Court Below Rests on Adequate and Independent State Grounds: the Standard to Be Applied in Consideration of a Motion for Summary Judgment and the Finding That Defendants Had Agreed to in Camera Disclosure of Confidential Informants.

These consolidated cases, although over two years old, are yet in the infancy of factual development. Discovery has not been completed. The judgment upon which review is sought by Petitioners is a reversal of summary judgment, remanding the causes to the trial level. The lack of adequate factual development in these cases make meaningful factual analysis difficult, as is clear from the divergence in the statements of fact.

According to Petitioners, the New Mexico Court of Appeals misconstrued the "actual malice" test announced in *New York Times Co.* v. *Sullivan*, 376 U.S. 254 (1964), and its successors. Even cursory examination of the opinion of the Court of Appeals shows its understanding of "actual malice" as a term of art in defamation suits. The Court of Appeals clearly states that actual malice means that the Petitioner broadcasters either published with knowledge of the falsity of statements made, or had a high degree of awareness of probable falsity, or entertained serious doubt as to the truth of statements made, but nevertheless aired them. (*See*, Petition Appendix 14).

Much of the Petition reviews the actual malice and reckless disregard standards. But there is really no conflict between those standards and the Court of Appeals

opinion. The real issue decided by the Court of Appeals deals rather with the burden of that standard upon motion for summary judgment. That question, we submit, is one peculiar to state practice which does not rise to constitutional dimensions.

The Court of Appeals held, in essence, that whether evidence of actual malice had been presented was irrelevant unless and until the moving party showed the absence of a genuine issue of fact as to the actual malice. This is a commonplace rule in summary judgment practice; the moving party must show there is no genuine issue of material fact. The New Mexico and Federal Rules are identical in this respect. Rule 56, Federal Rules of Civil Procedure; Rule 56, New Mexico Rules of Civil Procedure. The Court of Appeals held that Defendants, Petitioners herein, must show they did not have knowledge of the admitted falsity of the statements made, and must further show facts upon which a lack of reckless disregard may be based. Then, and only then, does the burden shift. Only then must Plaintiffs, Respondents herein, show evidence as to actual malice. The Court of Appeals held Defendants had not established lack of actual malice on their part. (Petition Appendix 17, 20). This finding is neither directly challenged nor raised as a question in the Petition.

The Court of Appeals has decided that defamation cases must be measured against the same summary judgment standards generally applied in civil litigation. Application of ordinary civil litigation standards in defamation cases has been followed by other courts. *Tagawa* v. *Maui Publishing Company,* 427 P.2d 79 (Hawaii, 1967); Cf., *Guam Federation of Teachers, Local 1581, A.F.T.* v. *Ysrael,* 492 F.2d 438 (9th Cir. 1974); *Phoenix Newspapers, Inc.* v. *Church,* 24 Ariz. App. 287, 537 P.2d 1345 (1975), cert. denied, 425 U.S. 908 (1976). The determination that Petitioners failed to meet their burden on summary judgment is a far different issue than the one Petitioners set forth, i.e. that the Court of Appeals incorrectly applied the actual malice test.

That the moving party on summary judgment in defamation cases has the burden of showing the absence of a genuine issue of material fact is not specifically challenged here. Even if it were, it would appear that this is a procedural matter and thus a question of practice and pleading according to state court standards. So long as, in the final result, compliance with constitutionally mandated standards is met, the procedure is a matter to be left to the state. Cf., *Time, Inc.* v. *Firestone,* 424 U.S. 448 (1976).

Respondents have the heavy burden of showing actual malice. But until its absence is shown, we do not have to shoulder that burden for purposes of summary judgment.

The second point raised in the Petition deals with the order requiring Petitioners to disclose the identity of confidential informants. At the outset, it must be noted that this is not a blanket order of disclosure. The opinion of the Court of Appeals specifies that an in camera hearing be held, and that the trial court then decide whether release of the identity of the informants will lead to persuasive evidence on the issue of actual malice. (Petition Appendix 24). The determination by the trial court on the release of identity is to include findings on the reliability of the sources, prior knowledge of falsity of the alleged defamations, and whether reliance on the sources was reckless. (Petition Appendix 24). This is a narrow and specific disclosure order, clearly designed to protect the rights of all litigants.

The issue of the constitutionality of the disclosure order is moot because of the finding of the appellate courts below that Petitioners agreed to the disclosure procedure. In that respect, the Court of Appeals observed that ". . . Defendants have agreed to comply with this order." (Petition Appendix 24). Similarly, the New Mexico Supreme Court, in an extraordinary writ proceeding, held that Defendants had made an offer of disclosure substantially similar to that specified by the Court of Appeals. (Appendix A to this brief).

Petitioners appear to question, not the propriety of disclosure generally, but the propriety of disclosure where they claim disclosure would not be calculated to discover evidence that would tend to establish malice or reckless disregard. Thus, they seek review not on the basis of the standard, but rather on the factual determination. They ask this Court to make again a factual determination of the sufficiency of the evidence. This is not the role of the Supreme Court. It is clear that disclosure was not lightly ordered. Repeated protestations of Petitioners to the contrary, the Court of Appeals held that the broadcasts were not true. (Petition Appendix 17). The Court of Appeals specifically ordered the trial court to conduct an in camera inspection, and then make its determination as to disclosure. The trial court is to file specific findings on the reliability of the sources, any misrepresentation by Defendants, any prior knowledge of falsity by Defendants and whether reliance on the sources was reckless. Then, and only then, shall the trial court decide whether to order disclosure.

The order of disclosure complained of only requires an in camera inspection by the trial court. This is an in camera inspection Petitioners have long ago agreed to comply with. The Petitioners' argument regarding disclosure to Respondents is both premature (for disclosure to anyone other than the trial court has not yet been ordered), and a question of state law, since it has been found that Petitioners agreed to an in camera examination.

POINT II

The Decision of the Court Below Is Merely One Reversing Summary Judgment and Is Not a Final Judgment.

Jurisdiction of the Supreme Court has long been predicated upon entry of a final judgment below. Petitions for certiorari to a state court are dependent upon a final judgment or decree having been entered. 28 U.S.C. §1257. Petitioners were granted summary judgment by the trial court; the New Mexico Court of Appeals reversed. The consolidated cases are remanded for further discovery, for the possibility of summary judgment being entered again as to some plaintiffs, and for eventual trial.

It is clear that a trial may well dispose of this case. It had been determined that Respondents are public officials, and that the actual malice-reckless disregard standard is applicable. The question of actual malice will be left to the jury. In a real sense, the decision below is not final. Much remains to be done.

In *Cox Broadcasting Corp.* v. *Cohn,* 420 U.S. 469 (1975), four separate categories were recognized in which a decision may be treated as final for purposes of 28 U.S.C. §1257 even though additional proceedings were anticipated in the lower state courts. The facts of this case squarely fall without each recognized category. The first two categories are those in which the federal issue would be unaffected because remaining proceedings are insubstantial or unrelated to the federal question. *Cox Broad-*

casting Corp. v. *Cohn,* 420 U.S. at 478-480. Here, the federal issues, primarily the application of the actual malice standard, remains of import for future summary judgment proceeding and actual trial. The New Mexico Court of Appeals decision allows consideration of the federal issues; they will survive and be as present after trial as they now are. The federal issues will in fact be enhanced for Appellate review, since they will rest on adequate factual development, which is now not true. The remaining two categories involve cases wherein either the federal question would be procedurally barred by subsequent state proceedings, or where reversal of the State Court on the federal issue would be preclusive of any further litigation. *Cox Broadcasting Corp.* v. *Cohn,* 420 U.S. at 481-486. There is no apparent bar here of any federal question. Actual malice will remain an issue. Disclosure of the identity of informants is now only a possibility, not a probability. Even if disclosure is ultimately ordered, compliance with the safeguards set forth in the Court of Appeals opinion will still be an issue. The Supreme Court of New Mexico earlier noted on the same issue that review by extraordinary means could be sought. (Appendix A to this brief). Finally, the last category is concerned with cases in which the federal issue is plainly and finally decided, not subject to further review, and where reversal on the federal issue is preclusive of further litigation, and not merely controlling on the nature and character of proceedings. *Miami Herald Publishing Co.* v. *Tornillo,* 418 U.S. 241 (1974). Again, the issues of actual malice, and the sufficiency of the evidence, will remain for Appellate review even after trial by jury. A decision on the issue of disclosure of identity of informants cannot, of itself, terminate this litigation. Even without disclosure, Respondents could, as a logical proposition, prevail at trial. This possibility runs counter to the premises of the last

category, and, as has been noted, the only disclosure ordered is that an in camera hearing be held, and that disclosure thereafter be determined.

No statute or isolated principle of federal law is drawn into question. This is simply a reversal of an order granting summary judgment on issues complexly embracing federal questions. Defamation and the First Amendment are complex areas of the law, and Petitioners here seek to raise arguments on the merits of the case, rather than on the propriety of reversing summary judgment. If review should be had upon issues such as Petitioners present, it should be reviewed upon a full trial of the facts and the law applied to those facts by the trial court. Sketchy factual developments and continuing state jurisdiction over these cases and the implicit federal questions militate against this Court accepting cases such as this one. The decision below simply lacks finality.

POINT III

The Order of Disclosure Is Calculated to Insure That Only Evidence Relevant to Actual Malice Will Be Released; It Thus Fully Protects All Rights of All Parties.

Many of the cases cited by Petitioners are urged for the proposition that there should be at least some limited or qualified privilege for newsmen to withhold disclosure of confidential sources. Assuming the propriety of that position, this case does not present any substantial conflict. As has been noted, only an in camera review has been ordered. (Petition Appendix 24). Thereafter, before disclosure to Plaintiffs, the trial court must make specific findings as to reliability, prior knowledge, falsity and reckless reliance. These standards are far more strict and exacting

than those in *Cervantes* v. *Time, Inc.*, 464 F.2d 986 (8th Cir. 1972), a leading case urged by Petitioners. *Cervantes* speaks only of "some factor" supporting serious doubt as to truth of the matters asserted. Here, specific findings are required.

The only other objection which Petitioners could raise, though it was unvoiced, is that they object to an in camera determination by the trial court. The Court of Appeals determined that Defendants had not met their burden on summary judgment, and that the broadcasts were false. They also found evidence upon which to predicate, at the least, a minimal showing of reckless disregard. Thus, there were grounds upon which to order complete disclosure. Ordering an in camera examination, instead, is an extremely conservative method. This Court has held that in camera review is an appropriate means of dealing with a claim of governmental privilege. *Kerr* v. *United States District Court for the Northern District of California*, 426 U.S. 394, 406 (1976); *United States* v. *Nixon*, 418 U.S. 683, 706 (1974); *United States* v. *Reynolds*, 345 U.S. 1 (1953). The same considerations which commend an in camera review are present here. Petitioners assert an issue of privilege. In camera review provides the proper balance between claims of irrelevance and privilege on the one hand, and relevance and materiality on the other. Cf., *United States* v. *Nixon, supra*. The order of the Appellate Court below is eminently reasonable; one designed to protect the rights of all litigants. In such a case, no good reason appears for granting the writ.

CONCLUSION

The Appellate Court below has made a reasonable decision on what is only an interlocutory matter—reversal of the grant of summary judgment. The New Mexico Court of Appeals applied traditional summary judgment standards, and found that the Petitioners had failed to meet their burden—they had not shown the truth of the matters broadcast, and had failed to show a lack of actual malice on their part. Moreover, as the Court noted, Petitioners agreed to the order of disclosure, at least insofar as it requires an in camera examination by the trial court. There are no novel questions of law raised herein, no burning issues requiring resolution. Respondents respectfully pray that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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APPENDIX

APPENDIX A

IN THE SUPREME COURT OF THE
STATE OF NEW MEXICO

Thursday, September 16, 1976

NO. 11,043

HUBBARD BROADCASTING, INC.,
LEO ZANI, RICHARD McKEE and
DIANE DIAMOND,
Petitioners,

vs.

THE HON. RICHARD B. TRAUB,
District Judge of the Second
Judicial District, State of
New Mexico,
Respondent.

ORDER

THIS MATTER having come on for consideration by the Court upon the Alternative Writ of Superintending Control and Alternative Writ of Prohibition heretofore issued herein and the briefs and arguments of counsel, and it having been made to appear to the Court that the district court recognizes the gravity of the issues involved in this case; that defendants have offered the tape recordings of their interviews with the confidential informants for an in camera examination by the district court; that defendants have agreed to an in camera interview

of the confidential informants by the district court; and that the district court has expressly ordered:

> "That prior to any order of disclosure, the Court shall give not less than ten days' notice of its intention to order disclosure so as to permit defendants to take whatever appropriate measures they deem necessary to object to any order of disclosure contemplated by the Court."

NOW, THEREFORE, it is the opinion of this Court that the district court has ordered no more than in effect has been offered by defendants, and by its order has adequately protected defendants and the confidential informants against any improper disclosure of the identity of said confidential informants which the district court might hereafter order. Consequently, it is the decision and order of this Court that the Alternative Writ of Superintending Control and Alternative Writ of Prohibition heretofore issued on the 22nd day of July 1976 should be, and it is hereby, vacated and quashed.

/s/ LaFel E. Oman
LaFel E. Oman, Chief Justice

WE CONCUR:

/s/ John B. McManus, Jr.
John B. McManus, Jr., Justice

/s/ Mack Easley
Mack Easley, Justice